Master Brisbane ak Itang (suing by Itang ak Lang, his father and next friend) v Mr Robinson Lee & Ors

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO KG24–457 OF 2009-I
LINTON ALBERT J
15 MARCH 2010

Civil Procedure — Transfer of action — From sessions court to High Court — Application for — Trial already commenced in sessions court — Claim beyond RM250,000 — Parties failed to agree to invoke s 65(3) of the Subordinate Courts Act 1948 — Whether plaintiff could use procedure in s 66(2) to transfer case

The plaintiff applied to transfer the action which he commenced in the sessions court to the High Court, on the common ground that the plaintiff's claim was beyond RM250,000 limit of the civil jurisdiction. However, the application was made after the trial at the sessions court had already commenced. The plaintiff relied on para 12 of the Schedule to the Courts of Judicature Act 1964. However, the parties had failed to agree to invoke s 65(3) of the Subordinate Courts Act 1948 ('the Act') which provided for the parties to enter into an agreement in writing that the sessions court shall have the jurisdiction to try the case where the amount exceeded the value limit of jurisdiction.

Held, allowing the application:
It was not unknown for the High Court to order transfer of an action from the sessions court to the High Court. The defendant's reliance on the case of *Malacca Securities Sdn Bhd v Loke Yu* [1999] 6 MLJ 112 was misplaced as the instant application concerned transfer of an action from the sessions court to the High Court whereas the case of *Malacca Securities* was a case involving transfer of a suit from the High Court at Melaka to the High Court at Kuala Lumpur. Further, there was no conceivable reason why the procedure set out in s 66(2) of the Act concerning counterclaims which involved matters beyond the jurisdiction of the sessions court could not be applied to a case where, as here, the claim involved an amount in excess of its jurisdiction. The action was thus ordered to be registered in the cause book of the High Court and proceeded with as if the action was instituted in the High Court pursuant to s 66(2) of the Act (see paras 6–7, 9 & 11–12).

[Bahasa Malaysia summary

Plaintif telah memohon untuk memindahkan tindakan yang dimulakan di mahkamah sesyen ke Mahkamah Tinggi, atas alasan biasa bahawa

tuntutannya melebihi batasan RM250,000 bidang kuasa sivil. Walau bagaimanapun, permohonan tersebut dibuat selepas perbicaraan di mahkamah sesyen dimulakan. Plaintif bersandar pada perenggan 12 Jadual Akta Mahkamah Kehakiman 1964 ('Akta tersebut'). Walau bagaimanapun, pihak-pihak gagal mencapai persetujuan untuk membangkitkan s 65(3) Akta Mahkamah Rendah 1948 yang memperuntukkan bahawa pihak-pihak dikehendaki memasuki perjanjian bertulis bahawa mahkamah sesyen mempunyai bidang kuasa untuk membicarakan kes dimana jumlah melebihi batasan nilai bidang kuasa.

Diputuskan, membenarkan permohonan:
Ia bukan satu kelaziman bagi Mahkamah Tinggi untuk mengeluarkan perintah pemindahan tindakan dari mahkamah sesyen ke Mahkamah Tinggi. Sandaran defendan pada kes *Malacca Securities Sdn Bhd v Loke Yu* [1999] 6 MLJ 112 adalah salah kerana permohonan ini adalah berkaitan dengan pemindahan tindakan dari mahkamah sesyen ke Mahkamah Tinggi manakala *Malacca Securities* adalah kes yang berkaitan dengan pemindahan guaman dari Mahkamah Tinggi Melaka ke Mahkamah Tinggi Kuala Lumpur. Tambahan lagi, tiada alasan yang boleh diterima dikemukakan tentang mengapa prosedur yang termaktub dalam s 66(2) Akta mengenai tuntutan balas yang berkaitan dengan perkara-perkara yang melampaui bidang kuasa mahkamah sesyen tidak boleh dipakai dalam kes, seperti ini, berkaitan dengan tuntutan yang melebihi batasan bidang kuasa. Oleh itu, tindakan ini diperintah untuk didaftarkan di dalam buku guaman Mahkamah Tinggi dan diteruskan seolah-olah tindakan ini dimulakan di Mahkamah Tinggi menurut s 66(2) Akta (lihat perenggan 6–7, 9 & 11–12).]

Notes

For a case on transfer of action from sessions court to High Court, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 8745.

Cases referred to

Malacca Securities Sdn Bhd v Loke Yu [1999] 6 MLJ 112, HC (not folld)
Riviera Bay Resort & Condo Management Sdn Bhd v Sri Rimba Mentari Development Sdn Bhd [2003] 4 MLJ 40; [2003] 8 CLJ 720, HC (refd)
Time Online Dotcom Bhd v Bates (Malaysia) Sdn Bhd [2005] 4 MLJ 251; [2005] 6 CLJ 389, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 Schedule para 12
Subordinate Courts Act 1948 ss 65(1)(h), (3), 66(2)

Shankar Ram (Thomas Shankar Ram & Co) for the plaintiff.
Mohd Taufik Mohd Yusoff (Senior Federal Counsel, Attorney General's Chambers) for the first, second, third, fourth & sixth defendants.
Joseph Chioh (State Legal Officer, Attorney General's Chambers) for the fifth defendant.

Linton Albert J:

RULING

[1] This is an application by the plaintiff for the transfer of the action commenced by the plaintiff in the sessions court in Summons No 53–66 of 2008-III ('the action') to the High Court although the trial of the action at the sessions court had commenced. It is common ground that the plaintiff's claim is beyond the RM250,000 limit of the civil jurisdiction of the sessions court under s 65(1)(h) of the Subordinate Courts Act 1948 and the parties have failed to agree to invoke s 65(3) of the Act which states:

> When the parties to an action or suit which, if the amount in dispute or value of the subject matter thereof did not exceed the limit of the jurisdiction, would be cognizable by a sessions court, have entered into an agreement in writing that the sessions court shall have jurisdiction to try the action or suit, the sessions court shall have jurisdiction to try the same, although the amount of the subject matter thereof may exceed the value limit of jurisdiction.

[2] The undisputed facts are sufficient to determine the application without having to descend into dwelling on the charges and counter charges made by the parties on the circumstances which led to this application. It is thus a simple application uncomplicated by the complexities of the charges and counter charges.

[3] The plaintiff relies on para 12 of the Schedule to the Courts of Judicature Act 1964 which is as follows:

> 12 *Transfer of Proceedings*
>
> Power to transfer any proceedings to any other Court or to or from any subordinate court, and in the case of transfer to or from a subordinate court to give any directions as to the further conduct thereof:
>
> Provided that this power shall be exercised in such manner as may be prescribed by any rules of court.

[4] In *Riviera Bay Resort & Condo Management Sdn Bhd v Sri Rimba Mentari Development Sdn Bhd* [2003] 4 MLJ 40; [2003] 8 CLJ 720, an

authority cited by learned counsel for the plaintiff, the facts relevant to the determination of these applications are set out in the headnote. They are as follows:

> The applicant then applied to the Chief Judge of Malaya for leave to transfer the magistrate's court summons to the sessions court, and thereafter, filed an application to the sessions court for an order to transfer same to the sessions court and for the said summons to be consolidated and heard together with the sessions court summons ..., the Chief Judge of Malaya issued a direction that the applicant apply to the High Court to transfer the magistrate's court summons to the sessions court, which the applicant did.

[5] In allowing the application Low Hop Bing J (as he then was) had this to say at p 725:

> As the applicant before me has indeed applied to the learned Chief Judge for an order of transfer, and has been directed to apply to this High Court, the learned Chief Judge must have contemplated that this court has the jurisdiction which is unlimited: *Scotch Leasing Sdn Bhd (in receivership) v Chee Pok Choy & Ors* [1995] 2 MLJ 105; [1997] 2 CLJ 58, as referred to in *Malacca Securities*.
>
> In my view, the jurisdiction of the High Court in making an order of transfer and consolidation of proceedings in subordinate courts has been expressly provided for in para 12, particularly the words '*Power to transfer any proceedings* ... to or from any subordinate courts, and in the case of transfer to or from a subordinate court to give any *directions as to the further conduct thereof*'. (Emphasis added.)

[6] It is also not unknown for the High Court to order transfer of an action from the sessions court to the High Court. A case in point is Originating Summons No 24–190 of 2002-I where Richard Malanjum J (as he then was) made such an order.

[7] The defendants on the other hand, rely on *Malacca Securities Sdn Bhd v Loke Yu* [1999] 6 MLJ 112, a case concerning the application for the transfer of a suit from the High Court in Malaya at Melaka to the High Court in Malaya at Kuala Lumpur. The application was dismissed and Augustine Paul J (as he then was) had this to say at p 124:

> It follows that in the absence of any rules having been made as required by the proviso to para 12 the exercise of the power conferred by the paragraph would depend on whether the rules constitute a condition precedent to the exercise of such power ... As this power has been taken out from the enacting part of the paragraph it is not exercisable unless rules are made as stipulated in the proviso. The result is that the enacting part of the paragraph is only left with the power to order a transfer with no power to perform or carry out the order so made. An order made without power to enforce it will be ineffectual. This is particularly significant as the proviso is designed to regulate the procedure to be followed when an order

A is made for the transfer of a case from a High Court to another court of co-ordinate jurisdiction. It is therefore my view that the exercise of the power conferred by para 12 depends on the existence of rules contemplated by its proviso as any order made without any rules to that effect would be ineffectual as it cannot be carried out. The language employed in the proviso also supports this conclusion. The use of the word 'shall' in the proviso gives it a mandatory effect.

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[8] In refusing to follow the case of *Malacca Securities Sdn Bhd* Low Hop Bing J (as he then was) in the case of *Riviera Bay Resort & Condo Management Sdn Bhd* said at p 46 (MLJ); p 725 (CLJ):

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It is necessary to observe that in so far as para 12 is concerned, the focus of the judgment was in respect of the transfer of proceedings from a High Court to another High Court of co-ordinate jurisdiction.

D **[9]** It stands to reason, therefore, that the reliance on *Malacca Securities Sdn Bhd* is misplaced because the instant application concerns transfer of an action from the sessions court to the High Court.

E **[10]** There is, in substance, no difference between a claim and a counterclaim. In *Time Online DotCom Bhd v Bates (Malaysia) Sdn Bhd* [2005] 4 MLJ 251; [2005] 6 CLJ 389 Abdul Malik Ishak J (as he then was) had this to say in relation to a counterclaim at p 255 (MLJ); p 393 (CLJ):

F It is a separate independent action and it may be made in respect of any matter, whenever and however arising ... In terms of quantum, the counterclaim may be more or less than the amount of the plaintiffs claim and it usually arise upon the issuance of the writ (*Wood v Goodwin* [1884] WN 17). Procedurally, in a counterclaim the defendant would be treated as if he were a plaintiff ...

G **[11]** There is therefore no conceivable reason why the procedure set out in s 66(2) of the Subordinate Courts Act 1948 concerning counterclaims which involve matters beyond the jurisdiction of the sessions court cannot be applied to a case where, as here the claim involves an amount in excess of its jurisdiction. Section 66(2) states:

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(2) In any such case the High Court may, if it thinks fit, on the application of any party, order that the action or suit be transferred to the High Court, and the action or suit shall then be entered in the cause book or register of civil suits of the High Court, and proceeded with as if the action or suit had been originally instituted

I therein.

[12] In the circumstances the application is allowed in terms as prayed for in prayer 1 of the originating summons (encl 2) and the respective parties to bear their own cost of this application. It is further ordered that the action be

registered in the cause book of the High Court and proceeded with as if the action was instituted in the High Court pursuant to s 66(2) of the Subordinate Courts Act 1948.

[13] Order accordingly.

Application allowed.

Reported by Kanesh Sundrum